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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 41

SAM UMANS,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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In the

Supreme Court of the United States

OCTOBER TERM, 1966

No.

SAM UMANA,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Sam Umana, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit which affirmed his conviction for violations of 18 U.S.C. §§ 201 and 201(b) and aiding and abetting violations of 26 U.S.C. § 7214(a)(2).

The Opinion Below

The opinion of the Court below, which has not yet been officially reported, is found in

Jurisdiction

The judgment of the Court of Appeals was rendered and entered on October 7, 1966. A timely application for rehearing was made on November 10, 1966 and denied on

November 15, 1966. Upon application of counsel for petitioner, this Court extended the time for filing a petition for a writ of certiorari through January 14, 1967.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented for Review

1. Is an indictment sufficient if the only evidence before the Grand Jury is the testimony of a Government agent, who had no personal knowledge and who briefly summarized affidavits of witnesses who later testified at trial and were readily available to testify before the Grand Jury?

2. Was it error under the Jenck's Act to refuse to permit petitioner to inspect witnesses' written statements containing admissions that the witnesses committed crimes involving moral turpitude?

3. May a payer of money be an aider and abettor under 26 U.S.C. § 7214(a)(2) which prohibits the receipt of unauthorized payments by Government officials and which necessarily requires the acts of two people?

4. Is Title 18 U.S.C. § 201(*f*) which prohibits a person from giving money to a public official "for the proper discharge of official duty" inconsistent with Title 18 U.S.C. § 201(b) which prohibits the payment of money "corruptly"?

Applicable Constitutional and Statutory Provisions

United States Constitution, Amendment V:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in

the land or naval forces, or in the Militia, when in actual service in time of War or public danger; * * *."

The pertinent text of Title 18 U.S.C. § 201 (as effective until January 20, 1963), 18 U.S.C. § 201(b) and (f) as (effective January 21, 1963), 18 U.S.C. § 2, 26 U.S.C. § 7214(a)(2), and 18 U.S.C. § 3500 is set forth in the supplement.

Statement of the Case

Petitioner, a certified public accountant, was convicted of aiding and abetting Internal Revenue Service agents in receiving illegal fees (26 U.S.C. §7214(a)(2) and 18 U.S.C. § 2) and of giving money to Internal Revenue Service agents (18 U.S.C. §§ 201[1] and 18 U.S.C. §§ 201(b) and (f)).[2] Three counts of the conviction under 18 U.S.C. § 201(f) were reversed by the Court of Appeals on the ground that they were lesser included offenses of 18 U.S.C. § 201(b).

The Government's case consisted almost entirely of the testimony of the Internal Revenue Service employees who allegedly received money from petitioner. Those employees were named as defendants in this case and, before trial, pleaded guilty to the counts in which they were named but were not sentenced.[3] A brief summary of their testimony follows:

Jeremiah Clyne testified that in about June 1963 petitioner asked him to secure the 1961 tax return of Alphone

[1] As effective until January 20, 1963.

[2] As effective since January 21, 1963.

[3] The only Government witnesses who were not defendants were Herbert Vannatta, a technical witness who testified about Internal Revenue Service procedure (27a), and Seymour Levine, a former Internal Revenue Service employee, who purported to corroborate the testimony of the defendant Montello on Count 11 and who had pleaded guilty in another case but, as of the time of trial, had not been sentenced (91a, 97a).

and Ethel Jacs (33-34a).[1] Clyne, who audited the return on June 14, 1963 in petitioner's presence, disallowed $700 in deductions after studying substantiation which petitioner produced (36a). On or about July 1, 1963, according to Clyne, after the taxpayers agreed to the disallowance, petitioner gave him about $75 (37a).

Thomas Ellington testified that petitioner represented taxpayers, Leo T. and Catherine C. Higdon in the September 27, 1961 audit of their 1960 tax return (42-43a). At the audit, travel and entertainment expenses of $600 and contributions of $400 were disallowed (45a). Petitioner had substantiation for part of the claimed travel and entertainment expenses and contributions (46a). After the audit, according to Ellington, petitioner left an envelope containing $20 or $25 on his desk (46-47a).

Louis R. Deitsch testified that petitioner was the taxpayers' representative in the audit of the following tax returns conducted on the following dates:

(a) 1959 return of Leo and Catherine Higdon audited on January 11, 1961.

(b) 1959 return of Michael F. and Alice Mahony audited on January 14, 1961.

(c) 1959 return of Seward and Madeline Woodard audited on January 17, 1961.

(d) 1960 return of James B. and Mary Lockhart audited on September 27, 1961.

(e) 1961 return of David and Maizie Rubenstein audited on December 13, 1962.

(f) 1961 return of David T. and Mary T. Warner audited on December 13, 1962 (52-54a).

According to Deitsch, before each audit petitioner asked Deitsch to pull the case from the file and they "could work

[1] References with the suffix "a" are to petitioner's appendix.

something out together on it" (54-55a). In each instance they agreed upon a disallowance (56a). After each taxpayer consented to the disallowance and the audit was concluded, petitioner gave Deitsch an envelope containing $50 for each case (57-58a).

Jeremiah Ryan testified that petitioner represented taxpayers Howard and Olive Shank in the June 20, 1961 audit of their 1960 tax return (65-66a). He said that at the audit petitioner said that if they could make an adjustment on one of the items, perhaps he could give something to Ryan (66a). Travel and entertainment expenses in the amount of $1,100 were disallowed (67a). After the taxpayers consented to the disallowance, according to Ryan, petitioner gave Ryan $50 (68-69a).

Ryan also testified that petitioner represented taxpayers in the October 2, 1963 audit of the 1962 tax return of Arthur and Marguerite Mountrey (69-70a). Travel and entertainment expenses of $400 were disallowed (70a). After audit, according to Ryan, petitioner gave him an envelope containing $50 (71a).

Jeanne Lupesco was introduced to petitioner by Leo Weissberg, her group chief (79-80a). She testified that petitioner represented the taxpayer in the December 1962 audit of the 1961 tax return of Robert and Shirley Jennings (80a). Lupesco disallowed $200 in contributions and $850 in travel and entertainment expenses (83a). At the audit, according to Lupesco, petitioner offered her $75 and after the audit, when the taxpayer had consented to the disallowance, petitioner gave her $75 (82-84a).

Seymour Levine, an Internal Revenue Service employee who was not named in this indictment, and Lawrence Montello who was named, both testified about the audit of the 1961 tax return of Richard and Joanne P. Hurley (94a, 99a). Levine, who was a group chief, testified that petitioner asked him to give the Hurley return to an auditor

"who would not be too rough and who could do a quick audit, not waste too much of his time" (93a). Levine assigned the return to Lawrence Montello, one of the agents in his section (94a). Levine testified that between January 28, 1963, when the return was assigned, and February 4, 1963 when the taxpayers consented to the disallowance, petitioner gave Levine two envelopes containing $50 each (93-95a).

Montello testified that Levine assigned the Hurley return to him, told him it was petitioner's case and said that he would be taken care of (99-101a). Montello testified that between January 28, 1963 and February 4, 1963 Levine gave him $50 (102-03a).

None of the witnesses who testified at trial appeared before the grand jury that indicted petitioner,* and the District Court refused to permit petitioner to inspect the Grand Jury minutes to determine what, if any evidence, the Grand Jury heard to support the indictment (106a). The Government, in its brief to the Court of Appeals, admitted that the evidence before the Grand Jury consisted entirely of the testimony of a Government agent who "briefly summarized" affidavits which had been executed by the Government witnesses who later testified at the trial.** The Government in its brief also admitted that "the availability of the Government witnesses prior to the trial and the indictment was well known to the court, as was their willingness to cooperate in supplying evidence of illegal bribes."

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*Many of the witnesses testified before a different grand jury about matters unrelated to this case. (See 49a-50a, 106a.)

**The Government's brief (p. 24) states: "The procedure followed before the grand jury was as follows: The Government called as its witness an agent of the Internal Revenue Service who testified that certain persons (the Government witnesses at trial) had executed affidavits in connection with an investigation relating to Umans. The agent then briefly summarized the portions of the affidavits relating to the illegal payments made by Umans."

Reason for Granting the Writ

1. A Government agent's "brief summary" of witnesses' affidavits, being the entire grand jury testimony, is insufficient to support an indictment.

The Government has conceded and the Court of Appeals has found that "the indictment was based upon testimony of an Internal Revenue agent who summarized for the grand jury the contents of various affidavits of the witnesses who later testified at appellant's trial" (Supp. p. 36).[1] Whether or not such evidence is sufficient to support an indictment will affect not only this case but innumerable other cases because the Government, interpreting *United States* v. *Costello*, 350 U. S. 359 (1956), in the broadest possible way, has been making a practice of presenting this type of evidence to grand juries and the accused is without an effective remedy to compel the Government to produce other evidence. See, for example, *United States* v. *Payton*, 363 F. 2d 996, 1,000 (2d Cir. 1966), in which the dissenting opinion referred to the grand jury testimony as "shoddy merchandise". See also, *United States* v. *Borelli*, 336 F. 2d 376 (2d Cir. 1964), cert. den. 379 U. S. 960 (1965); *United States* v. *Heap*, 345 F. 2d 170 (2d Cir. 1965). Indeed, in this very case the Court of Appeals, while relying upon *Costello* to support the indictment, recognized "that excessive use of hearsay in the presentation of government cases to grand juries tends to destroy the historical function of grand juries in assessing the likelihood of prosecutorial success and tends to destroy the protection from unwarranted prosecutions that grand juries are supposed to afford to the innocent" (Supp. p. 36).

We ask the Court a) without disturbing *Costello* to reverse the conviction below because the evidence before the grand jury was so unreliable that it failed to rationally es-

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[1] "Supp." references are to the supplement following this petition.

tablish the facts, or b) alternatively, to review the decision in *Costello* and to formulate a rule requiring a minimum standard of evidence to be presented to grand juries either under the Fifth Amendment to the Constitution or under this Court's supervisory power over federal courts.

a) *Costello* v. *United States*, *supra*, is not necessarily controlling. In *Costello*, a complex income tax case, the witnesses before the grand jury were Government agents with hearsay knowledge who summarized facts given by 144 witnesses, 350 U. S. at 360, and subsequently testified at trial, giving much of the same information as they gave to the grand jury. "At the trial, with preliminary testimony laying the foundation for it, the same testimony constituted an important part of the competent evidence upon which the conviction was obtained" 350 U. S. at 365.

In the instant case, a Government agent briefly summarized relatively simple affidavits of witnesses who later testified at trial. There was no way to qualify this double hearsay testimony at trial nor was there the same practical reason for summarizing testimony which existed in *Costello* namely, to avoid summoning to the grand jury 144 witnesses whose testimony would have to be summarized to make it meaningful in any event.

The instant case is one of the many examples in which the Government, relying upon a broad reading of *Costello*, has developed a pattern of consciously attempting to avoid having witnesses with personal knowledge testify before grand juries. At times, the Government, instead of having a person with personal knowledge testify before the grand jury, has a Government agent who interviews that person testify. *United States* v. *Borelli*, *supra*, at 391. See also *United States* v. *Payton*, *supra*. At least in those cases, in the course of the interview, the agent has an opportunity to assess and later vouch for credibility of the person he interviews. Whether or not the grand jury testimony in those cases is sufficient to rationally establish the facts is

not the issue here because in the present case the evidence before the grand jury was not a summary of an agent's interview with a witness with personal knowledge. The testimony consisted entirely of an agent's brief summary of affidavits of witnesses with personal knowledge. There is no proof in this record that the agent ever spoke to the affiants. On this record, the agent may have merely summarized pieces of paper which were represented to him as being affidavits of persons who allegedly received money from petitioner. As a practical matter, to permit an indictment upon this kind of evidence is, we believe, to give the prosecutor the power to effectively abrogate the grand jury system.

The Government's reason which has been called a "transparently unworthy one" *United States* v. *Payton*, *supra*, at 1,000 (dissenting opinion), for adopting this procedure, is significant because it shows that this is no isolated case, but part of a planned policy designed to obviate the necessity of making grand jury testimony available to defense counsel. It is a policy which, if upheld, will continue and will make a mockery of the right not to be prosecuted except upon a grand jury indictment.

The procedure adopted in this case was obviously designed to avoid the holding of the Court of Appeals for the Second Circuit in *United States* v. *Borelli*, *supra*, that portions of the grand jury testimony of an agent who summarizes his interview with a witness who later testifies at trial must be made available to the defense where there are inconsistencies between the grand jury and trial testimony. In the instant case the testimony is one step removed from that in *Borelli* and the Government successfully argued that the grand jury testimony should not be made available to the defense (106a). While the Government's motivation may ordinarily be unimportant, it is relevant on this petition for certiorari because it shows that, unless halted by this Court, the procedure adopted in

this case, which results in "shoddy merchandise" being presented to grand juries, *United States* v. *Payton*, *supra*, (dissenting opinion) will continue and will become the rule rather than the exception if indeed it is not already the rule. The question of how far the Government should be permitted to go in presenting evidence to a grand jury which, because of its remoteness to any personal dealings with a prospective defendant becomes more and more unreliable, touches innumerable cases and vitally affects the Fifth Amendment right not to be accused of a crime except upon a grand jury indictment. We urge that the presentation of evidence before the grand jury in this case has denied the grand jury its historical function of assessing the likelihood of prosecutorial success and we ask this Court to dismiss the indictment.

b) *Costello* should be reviewed. Alternatively, we ask this Court to review its holding and broad language of *Costello* which has been interpreted to mean that an indictment valid upon its face, returned by a properly constituted grand jury, cannot be attacked by a defendant. See, for example, *United States* v. *Ramsey*, 315 F. 2d 119 (2d Cir.), cert. den. 375 U. S. 883 (1963), in which the Court of Appeals for the Second Circuit rejected a contention that there was "no valid evidence before the Grand Jury upon which an indictment could be founded" and said that *Costello* "precludes by very broad language any judicial inquiry into the sufficiency of the evidence before a Grand Jury". If the grand jury system is to be more than an ancient relic carried over from English Common Law, and if there is to be meaning to the Constitutional requirement that a person shall not be held for a crime unless there is an indictment by a grand jury, then some standard of evidence should exist which an accused may compel the Government to follow. Under the present system a defendant, who has a constitutional right not to be tried except upon a grand jury indictment, must rely entirely

upon the integrity of the prosecutor and the members of the grand jury not to indict upon evidence which does not rationally establish the facts. There is virtually no way for the accused to protect himself from an indictment based upon unreliable or frivolous evidence and thus the accused has an illusory right because it is not coupled with any remedy.

This Court in affirming *Costello* said that historically the grand jury could act on their own knowledge and was free to indict on such information as they deemed satisfactory, 350 U. S. at 362. However, even historically, as the Government recognized in its brief to this Court in *Costello*, there was a "readily understandable reluctance on the part of at least some judges to send affidavits to a Grand Jury as a substitute for live witnesses" (Govt. Br., p. 22). No matter what rule existed historically, we suggest that in the light of modern day experience some enforceable evidentiary standard is necessary. In modern times grand juries, ever ready to indict based upon evidence such as that presented in this case, are becoming nothing more than an investigatory tool of the prosecutor rather than a buffer between the prosecutor and the prospective accused. This case and others similar to it show that grand juries are willing to indict based upon the flimsiest evidence. If the grand jury system is to be abolished as it has been in England since 1933*, it should be by Constitutional Amendment, not by fiat of the prosecutor.

Assuming that an enforceable standard as to the quality and quantity of evidence before the grand jury is desirable, the issue becomes what that standard should be. We believe that an enforceable rule should be formulated which would require Grand Jury indictments to be based upon at least the same qualitative and quantitative evidentiary

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*23 & 24 Geo. 5, c. 35; 5 Halsbury's Statutes of England (2d ed. 1948), pages 1065-1073.

requirements which now exist for probable cause for an arrest or for a search warrant. Historically, it has always been and still is the Grand Jury's function to determine whether or not there is "probable cause" to hold a man for trial. See *Giordenello* v. *United States*, 357 U. S. 480, 487 (1958). This Court has through the years developed standards for determining probable cause for an arrest and for a search warrant. For example, hearsay alone is insufficient to establish probable cause for an arrest; the arresting officer must have a substantial basis for crediting the hearsay. *Jones* v. *United States*, 362 U. S. 257 (1960); *Draper* v. *United States*, 358 U. S. 307 (1959). We suggest, at the very least, that a similar standard is appropriate for grand jury proceedings. It is anomalous that a person may be arrested only on probable cause but must suffer the expense and the public humiliation of a criminal trial on something less than probable cause. "A wrongful indictment is no laughing matter; often it works a grievous, irreparable injury to the person indicted. The stigma cannot be easily erased." *In re Fried*, 161 F. 2d 453, 458 (2nd Cir.), cert. dismissed, 332 U. S. 807 (1947).

It has been held that it is unnecessary to establish probable cause for an arrest if the arrest comes as a result of an indictment "because the grand jury's determination that probable cause existed for the indictment also establishes that element for the purpose of issuing a warrant." *Giordenello* v. *United States*, *supra*, at 487. However, when one attempts to determine whether or not there was probable cause for the indictment by any standard, he is blocked by the authority of *Costello*. If a Grand Jury determination conclusively establishes probable cause and that determination is based upon unreliable evidence then the Fifth Amendment right to be indicted by a Grand Jury is nothing but a procedural formality.

One of the primary reasons given by this Court in *Costello* for refusing to permit petitioner to attack the testi-

mony before the Grand Jury is that "if indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed." 350 U. S. at 363. This Court said that "the result of such a rule would be that before trial on the merits a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury." *Ibid.*

We believe that experience with the enforcement of other constitutional rights and the experience of those states which do permit inquiry into the sufficiency of the evidence teaches that this problem is not realistic. Thus, for example, hearings are held to determine whether or not there is probable cause for an arrest or a search, the facts and circumstances surrounding a confession, and whether or not evidence was seized illegally. See, for example, *Battle* v. *United States*, 345 F. 2d 438 (U.A.D.C. 1965); *Austin* v. *United States*, 297 F. 2d 356 (4th Cir. 1961); *Nardone* v. *United States*, 308 U. S. 338 (1939); Fed. Rules of Cr. Proc., Rule 41(e).

This Court in sealously protecting the rights of persons to be free from arrests and searches except upon probable cause has not been deterred from enforcing those rights because inevitably litigation is generated over these issues. Similarly, we believe that the argument that additional litigation will result through the enforcement of this right, should be rejected. Indeed, the experience in the State of New York where the standard of evidence before the Grand Jury is quantitatively and qualitatively higher than the one we are seeking in this case, shows that the danger of a flood of unmanageable litigation is illusory. We refer briefly to the procedure in that state merely to show that practical rules can be developed in this area which would protect the rights of the defendant without being burdensome.

By interpretation of the New York Constitution, *People* v. *Glen*, 173 N. Y. 395, 400 (1903), which has substantially the same language as the federal constitution* and by statute, N. Y. Code Crim. Proc. § 249, a Grand Jury may receive none but legal evidence, and an accused may compel that standard by moving to dismiss an indictment, *People* v. *Nitzberg*, 289 N. Y. 523 (1943); *People* v. *Sweeney*, 213 N. Y. 37 (1914). The reported cases in New York show that there has not been a flood of litigation which the New York Courts have found difficult to handle.[10]

In New York when a claim of insufficiency before the Grand Jury is made, the Court first determines whether or not the defendant has supplied extrinsic proof that there is "evidentiary insufficiency." *People* v. *Howell*, 3 A. D. 2d 153, 158 N.Y.S. 2d 985, 987 (1st Dept. 1957), aff'd 3 N. Y. 2d 672 (1958). If there is no extrinsic proof, the inquiry terminates. *People* v. *Pryor*, 11 N.Y.S. 2d 393, aff'd 283 N. Y. 623 (1940), and this, in and of itself, will have a natural tendency to limit the litigation. If, however, there is extrinsic proof of evidentiary insufficiency, then the Court inspects the Grand Jury minutes in camera and dismisses the indictment on its own motion if the evidentiary standard has not been met, *People* v. *Hirschberg*, 37 N.Y.S. 2d 861 (1942); *People* v. *Valerino*, 54 N.Y.S. 2d 521 (1945), or permits the defendant to inspect the minutes and brief and argue the point in those cases where the in camera inspection of Grand Jury minutes

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* Article 1, section 6 of the New York State Constitution provides that, "No person shall be held to answer for a capital or otherwise infamous crime . . . unless on indictment of a grand jury. . . ."

[10] Statutes in certain other states require that only legal evidence be admitted before the grand jury. Under certain of the statutes either because of the language of the statutes or by judicial interpretation defendants have been refused the right to have indictments quashed on the ground that there is insufficient evidence before the grand jury. The citations to the statutes appear in 1 Wigmore, Evidence (3d ed. 1940) 23 fn. 8.

shows that the point is fairly arguable. See *People* v. *Mitchell*, 140 Misc. 869, 251 N.Y.S. 716 (1931); *People* v. *Barnes*, 197 Misc. 477, 98 N.Y.S. 2d 481 (1950); *People* v. *Gentile*, 20 A. D. 2d 412, 247 N.Y.S. 2d 551 (1st Dept. 1964). A similar standard in the federal courts would insure that persons are indicted only upon reliable evidence without forcing prosecutors to produce their entire case before the grand jury.

Because there are no standards under federal law, there is confusion resulting in inconsistent determinations by the Courts. At times the lower courts have refused to permit examination of the grand jury minutes on the ground that *Costello* precludes inquiry into the sufficiency of evidence before the grand jury. See, for example, *United States* v. *Ramsey, supra.* At other times, even after *Costello*, upon defendants' requests, courts have inspected grand jury minutes in camera or have permitted inspection by the defendant, thereby implicitly recognizing that under some circumstances evidence before a grand jury may be insufficient or prejudicial. *Coppedge* v. *United States*, 311 F. 2d 128 (D. C. Cir. 1962), cert. den. 373 U. S. 946 (1963).[11] *Beatrice Foods Co.* v. *United States*, 312 F. 2d 29 (8th Cir. 1963), cert. den. 373 U. S. 904 (1963).[12]

We believe that an enforceable evidentiary standard is necessary if the Fifth Amendment guarantee of indictment by grand jury is to be more than a mockery. We ask the Court to grant this petition and to reverse petitioner's conviction because of the inadequacy of evidence before the grand jury.

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[11] The defendant claimed that perjured testimony was given to the grand jury.

[12] The defendant claimed that the prosecutor conducted himself improperly before the grand jury by accusing witnesses of lying, threatening them with prosecution for perjury, acting belligerently toward witnesses and asserting the very matter under consideration by the grand jury.

2. Statements of Government witnesses, who admitted prior acts involving moral and turpitude, should have been made available to the defense under the Jencks Act.

The Government witnesses at trial were Internal Revenue Service employees who testified about payments allegedly received by them from petitioner. After their direct testimony, the witnesses' written statements in the Government's possession were requested by the defense. However, at the Government's request, on the theory that they were not related to the direct testimony, the Court below refused to make certain of them available (37-38a, 48a, 72-73a, 103a). Those statements were found by the Court of Appeals to "relate to payments received by the Government witnesses from persons other than appellant. . . ." (Supp. p. 37) and thus relate to prior acts of misconduct of the witnesses involving moral turpitude.

We believe that any statement which includes a witness' prior acts of misconduct involving moral turpitude affects his credibility and therefore his direct testimony and that the withheld statements should have been made available to the defense under the Jencks Act. This issue is of general importance because it affects not only this case but every case in which a witness has made a statement admitting a prior act of misconduct involving moral turpitude in which the statement is not turned over to the defense. This would include a large number of cases in which co-conspirators who themselves have been guilty of prior misconduct are the chief witnesses in the case and have given statements to the Government.

This Court has held that statements which relate to the credibility of a witness relate to the subject matter of his direct testimony within the meaning of the Jencks Act and should be made available to the defense. Thus, in *Rosenberg* v. *United States*, 360 U. S. 367 (1959), this Court said that a statement by a witness that she feared her memory as to the evidence at issue was poor should have been made

available to the defense. In *United States* v. *Borelli*, *supra*, the Court of Appeals for the Second Circuit said that a statement that would support impeachment for bias and interest relates to a witness' direct testimony. 336 F. 2d at 393. In the same manner a statement in which a witness admits that he has committed criminal acts involving moral turpitude which would be relevant in determining credibility, *United States* v. *Whiting*, 311 F. 2d 191 (4th Cir. 1962), cert. den. 372 U. S. 935 (1963), relates to the witness' direct testimony and therefore should be made available to the defense. These are precisely the kind of statements which the Court below refused to make available and therefore the judgment of conviction should be reversed.

3. Petitioner was improperly convicted of aiding and abetting violations of 26 U.S.C. § 7214(a)(2) which necessarily requires the acts of two people and with respect to which petitioner could not be an aider and abettor.

Petitioner, in Counts 1 through 9 of the indictment, was convicted of aiding and abetting violations of 26 U.S.C. § 7214(a)(2) which, in substance, prohibits Internal Revenue Agents from accepting money otherwise than as prescribed by law for the performance of their duties. Under the circumstances of this case in which petitioner is accused of having paid the money, petitioner may not be convicted of being an aider and abettof because it is impossible to commit the substantive offense without cooperative action. The decision of the Court of Appeals in the instant case, while consistent with a Second Circuit decision, *United States* v. *Kenner*, 354 F. 2d 780 (1965), cert. den. 383 U. S. 958 (1966) and a District of Columbia Circuit decision, *May* v. *United States*, 175 F. 2d 994, cert. den. 338 U. S. 830 (1949), is inconsistent with prior decisions of this Court, *Gebardi* v. *United States*, 287 U. S. 112 (1932), *United States* v. *Katz*, 271 U. S. 354 (1926) and with a prior decision in Second Circuit, *United States* v. *Sager*, 49 F. 2d 725 (1931).

In *Gebardi* v. *United States*, *supra*, in which this Court reversed a Mann Act conviction of a man and the woman he was accused of transporting across State lines for purposes of prostitution, this Court, citing numerous authorities, said that "where it is impossible under any circumstances to commit the substantive offense without cooperative action, the preliminary agreement between the same parties to commit the offense is not an indictable conspiracy either at common law, . . . or under the federal statute." *Id.* at 122. The Court also said that it was resting its decision on the failure of the Mann Act to condemn the woman's participation in those transportations which are effected with her mere consent. *Id.* at 123.

In *United States* v. *Katz*, *supra*, in which the defendants were indicted for conspiracy to sell intoxicating liquors and the defendants were the buyer and the seller of the liquors, this Court affirmed the quashing of an indictment below and said "but as the defendants in each case were only one buyer and one seller, and as the agreement of the parties was an essential element in the sale, an indictment of the buyer and seller for a conspiracy to make the sale would have been of doubtful validity." *Id.* at 355.

In *United States* v. *Sager*, *supra*, the Court of Appeals said that "where concert is necessary to an offense, conspiracy does not lie." *Id.* at 727, and on that ground dismissed that count of an indictment alleging concert between several intended givers of a bribe and the intended taker of the same bribe.

The fact that the aforesaid cases were conspiracy cases and the instant case is an aiding and abetting case is a distinction without a difference for if the charge of conspiracy will not lie because the crime itself requires concert of action then the aiding and abetting charge will not lie for the same reason. Cf. *Gebardi* v. *United States*, *supra*, at 119; *Nye and Nissen* v. *United States*, 336 U. S. 613 (1949).

As noted above, *Kenner* v. *United States, supra*, and *May* v. *United States, supra*, are inconsistent with the aforesaid authorities. In *Kenner* an accountant was convicted of aiding and abetting a violation of 26 U.S.C., § 7214(a)(2). In the *May* case, in which a Congressman and a person who paid money to him were indicted for conspiracy to bribe, the Court affirmed the conviction below and rejected the argument that the crime required the acts of two people and a conspiracy charge would not lie.

This Court in *Gebardi* v. *United States, supra*, and *United States* v. *Katz, supra*, examined the intent of the Legislature in determining that a Mann Act conviction of a man and the woman he was accused of transporting across state lines for the purposes of prostitution could not stand, and in determining that a conspiracy to sell intoxicating liquors would not lie if the only persons accused are the buyer and the seller. In the instant case, an examination of the intent of the Legislature, as shown by the language of the statute itself, leads to the same conclusion. Title 26 U.S.C. § 7214(a)(2) provides, among other things, as a penalty, that the offender shall be dismissed from office or discharged from employment. Petitioner not being a public official could not be dismissed from office or discharged from employment.

Moreover, it would have been a simple matter for Congress, before 1963, to enact a statute having the same elements of § 7214(a)(2) encompassing the payer of money without intent to influence official acts rather than just the recipient. This was done in 1963 with the amendment to Title 18 U.S.C. § 201 which now is 201(f). To permit the Government through the use of 18 U.S.C. § 2 to bring in the alleged payer of money as an aider and abettor is inconsistent with the intent of the Legislature and with those cases which hold that a conspiracy count will not

lie, where the crime necessarily requires the acts of two people and those very two people are the accused.

4. Petitioner was convicted of violations of Title 18 U.S.C. § 201(f) (Counts 10, 11 and 12) and, on the identical facts, for violations of Title 18 U.S.C. § 201(b) (Counts 25, 26 and 27), which we believe to be mutually exclusive. Those sections, which became effective on January 21, 1963 and are now just beginning to make their way to this Court for interpretation, are mutually exclusive because § 201(f) prohibits the payment of money "otherwise than as provided by law for the *proper* discharge of official duty" and § 201(b) prohibits the payment of money to public officials "*corruptly*" and "with intent to influence official acts, to wit, the office audit examinations of Income Tax returns . . ." (emphasis supplied). Since the Court charged the jury the elements of both § 201(b) and § 201(f) in substantially the language of the statute (118-19a, 122-23a), the jury was permitted to find, on identical facts, that money was paid for the proper and improper discharge of duty. The Court of Appeals contrary to the above analysis, found that § 201(f) is a "lesser included offense" of § 201(b) and that both sections are consistent (Supp. p. 33).

The question posed—whether or not there are inconsistent elements of these two subdivisions of Title 18 U.S.C. § 201—will affect every case in which a violation of both sections is charged. This will include most accusations of giving money to public officials because if § 201(f) is a "lesser included offense", prosecutors will be motivated to charge both the more and the less serious crimes in the hope that there will be a conviction on at least one of the two sections.

A more complete analysis of the manner in which the above subdivisions of § 201 are inconsistent follows:

Title 18 U.S.C. § 201(f) provides a maximum two-year sentence and a $10,000 fine for the following:

> "(f) Whoever, otherwise than as provided by law *for the proper discharge of official duty*, directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official . . ." (emphasis supplied)

Title 18 U.S.C. § 201(b) provides, among other things, a maximum fifteen-year sentence and a $20,000 fine for the following:

> "(b) Whoever, directly or indirectly, *corruptly*, gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, *with intent*—
>
> (1) to influence any official act or . . ." (emphasis supplied)

In the instant case Counts 10 and 25 charge that on June 14, 1963 petitioner gave J. Clyne, an Internal Revenue Service employee, $75 in connection with the audit of the 1961 income tax return of A. & E. Jacs (8a, 11a). Counts 11 and 26 charge that on January 28, 1963 petitioner gave L. Montello, an Internal Revenue Service employee, $50 in connection with the audit of the 1961 income tax return of R. & J. Hurley (*Ibid.*). Counts 12 and 27 charge that on October 2, 1963 petitioner gave J. Ryan, an Internal Revenue Service employee, $50 in connection with the audit of the 1962 income tax return of A. and M. Mountroy (*Ibid.*).

The only difference between those two series of counts is that Counts 10, 11 and 12 charge under § 201(f) that the money was paid by the defendant for the "proper" discharge of duties of certain Government officials and Counts 25, 26 and 27 allege under § 201(b) that the money was paid by the defendant "corruptly" and with "intent to influence official acts."

The legislative history of these two sections is silent on this subject. However, the two series of counts are inconsistent with each other on their face for it is impossible to pay money for the "proper" discharge of an official act and, at the same time, to pay the same money with a "corrupt" intent to influence the same official act.

Reading the two sections most favorable to petitioner, as we must do because this is a criminal case, *United States* v. *Boston & M. R. Co.*, 380 U. S. 157, 160 (1965), and considering the fact that the charge to the jury contains substantially the same language as the sections quoted above (118-19a, 122-23a), the jury was permitted on the same facts to come to inconsistent conclusions.

If a jury verdict on one count negatives a fact essential to a finding of guilty on a second count, the two guilty verdicts cannot stand. *Marquez-Anaya* v. *United States*, 319 F. 2d 610 (5th Cir. 1963); *Thomas* v. *United States*, 314 F. 2d 236 (5th Cir.), cert. den. 375 U. S. 849 (1963). The fact that the Court of Appeals in this case has vacated the sentences on what it calls the "lesser § 201(f) counts" (Supp. p. 34) does not make the error harmless because it is not the province of the Court to guess what, if any, theory the jury would have adopted had their attention been drawn to the matter, and it is merely conjecture to say that the Court below was not influenced by the double conviction. *Fulton* v. *United States*, 45 App. D. C. 27 (1916); *Poole* v. *United States*, 37 App. D. C. 126 (1911). Accordingly, we respectfully urge that the conviction be reversed.

CONCLUSION

It is respectfully submitted that the questions raised are of such importance in the administration of criminal law that there should be authoritative determinations of the same by this Court. Accordingly, petitioner asks that this Court issue a writ to review the judgment of the Court of Appeals herein.

Respectfully submitted,

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655 Madison Avenue,
New York, N. Y. 10021.

SUPPLEMENT

Title 18 U.S.C. § 201 (as effective until January 20, 1963) provides:

> Whoever promises, offers, or gives any money or thing of value, or makes or tenders any check, order, contract, undertaking, obligation, gratuity, or security for the payment of money or for the delivery or conveyance of anything of value, to any officer or employee or person acting for or on behalf of the United States, or any department or agency thereof, in any official function, under or by authority of any such department or agency or to any officer or person acting for or on behalf of either House of Congress, or of any committee of either House, or both Houses thereof, with intent to influence his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, or with intent to influence him to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States, or to induce him to do or omit to do any act in violation of his lawful duty, shall be fined not more than three times the amount of such money or value of such thing or imprisoned not more than three years, or both.

Title 18 U.S.C. § 201 (which became effective January 21, 1963) provides in pertinent part:

> (b) Whoever, directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any

person who has been selected to be a public official to give anything of value to any other person or entity, with intent—

(1) to influence any official act; or

(2) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(3) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of his lawful duty,

* * * *

Shall be fined not more than $20,000 or three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

* * * *

(f) Whoever, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official;

* * * *

Shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

Supplement.

Title 26 U.S.C. § 7214 provides in pertinent part:

(a) Any officer or employee of the United States acting in connection with any revenue law of the United States—

* * * *

(2) who knowingly demands other or greater sums than are authorized by law, or receives any fee, compensation, or reward, except as by law prescribed, for the performance of any duty;

* * * *

Shall be dismissed from office or discharged from employment and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both. * * *

Title 18 U.S.C. § 2 provides:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

Title 18 U.S.C. § 3500 provides in pertinent part:

* * * *

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the

witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant and the defendant objects to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge.

Opinion of the United States Court of Appeals for the Second Circuit.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 344—September Term, 1965.
(Argued April 14, 1966 Decided October 27, 1966.)
Docket No. 30168

UNITED STATES OF AMERICA,

Appellee,

—v.—

SAM UMANS,

Appellant.

Before:

LUMBARD, *Chief Judge,*
WATERMAN and ANDERSON, *Circuit Judges.*

Appellant was named a defendant in 24 counts of a 27 count indictment. In nine of these counts he was charged with aiding and abetting codefendants, Internal Revenue Service agents, in receiving illegal fees, compensation and rewards for the performance of their duties, in violation of 28 U. S. C. § 7214(a)(2) and 18 U. S. C. § 2; in three with giving money to various Internal Revenue Service agents during the year 1963, in violation of 18 U. S. C. § 201(f); in nine other counts with giving money to various agents with intent to influence their official acts during the years 1961 and 1962, in violation of 18 U. S. C. § 201; and in three other counts with corruptly giving money to various agents of the Internal Revenue Service with intent to influence their official acts during the year 1963, in violation of 18 U. S. C. § 201(b). After a jury trial in the United States

District Court for the Southern District of New York, Murphy, *J.*, he was convicted on all 24 counts and was sentenced to two years' imprisonment on each count, the sentences to run concurrently. On appeal he claims various prejudicial trial errors and indictment inconsistencies. Judgment of conviction on 21 of the counts is affirmed. As to each of the three counts alleging violation of 18 U. S. C. § 201(f) it is held that these offenses are lesser included offenses within the criminal acts charged in violation of 18 U. S. C. 201(b), and the entry of judgment of conviction thereon is vacated.

JOHN S. ALLEE, Michael W. Mitchell, Bernard W. Nussbaum, Asst. U. S. Attorneys, Robert M. Morgenthau, U. S. Attorney, Southern District of New York, *for Appellee.*

EDWARD BRODSKY, William Esbitt, New York City, *for Appellant.*

WATERMAN, *Circuit Judge:*

Certain taxpayers took deductions on income tax returns for items of travel, entertainment, and the like, in excess of sums that could be substantiated. Appellant, a certified public accountant, then entered into arrangements with auditing employees of the Internal Revenue Service by which appellant made surreptitious cash payments to the employees and, upon audit, the employees disallowed a lesser portion of the deductions than should have been disallowed. Appellant was named a defendant in 24 counts of a 27 count indictment. In nine of these counts he was charged with aiding and abetting codefendants, Internal

Revenue Service agents, in receiving illegal fees, compensations and rewards for the performance of their duties, in violation of 26 U. S. C. § 7214(a)(2) and 18 U. S. C. § 2; in three with giving money to various codefendant Internal Revenue Service agents during the year 1963, in violation of 18 U. S. C. § 201(f); in nine other counts with giving money to the various agents with intent to influence their official acts during the years 1961 and 1962, in violation of 18 U. S. C. § 201; and in three other counts, which set forth the same acts that allegedly violated 18 U. S. C. § 201(f), with corruptly giving money to various agents of the Internal Revenue Service with intent to influence their official acts during the year 1963, in violation of 18 U. S. C. § 201(b). After a jury trial in the United States District Court for the Southern District of New York, Murphy, *J.*, he was convicted on all 24 counts and sentenced to two years' imprisonment on each count, the sentences to run concurrently.

Eight issues have been presented for appellate consideration.

First, appellate maintains that the trial court committed prejudicial error when it did not instruct the jury that in order to convict appellant on the nine counts charging the aiding and abetting of violations of 26 U. S. C. §7214(a)(2) one of the elements of the crimes necessary to be proved was criminal intent. It is not entirely clear whether appellant is maintaining that the charge was deficient as to appellant's intent to aid and abet or that it was deficient relative to the Internal Revenue Service agents' intent to commit the crime. But we note that no objection as to either was made to the charge as given, and no request for a further charge as to anyone's intent was made to the trial court before the jury retired. Therefore, unless there was a charge so deficient that we must consider it to be "plain

error" no objection to the charge will be here countenanced. See Fred. R. Crim. P. 30, 52(b).

With reference to Umans' intent to aid and abet the commission of the nine crimes, the charge given was proper. It followed the standard laid down in *Nye & Nissen* v. *United States*, 336 U. S. 613, 619 (1949) quoting L. Hand, *J.*, in *United States* v. *Peoni*, 100 F. 2d 401, 402 (2 Cir. 1938) that the defendant "in some sort associate himself with the venture, that he participate in it as something he wishes to bring about, that he seek by his action to make it succeed." Further, the jury convicted Umans on other counts that involved the same incidents, and as to those counts the jury was instructed that to find him guilty he must have made the payments with "an intent on the part of the defendant to corruptly influence the employee as to the audit then pending before him." Under these circumstances, we find no inadequacy in the charge as to the need of proof of Umans' intent to aid and abet.

The trial court's charge did not include any instructions that proof of the criminal intent of Internal Revenue Service agents to commit the crimes they committed in violation of 26 U. S. C. § 7214(a)(2) was necessary in order to convict Umans of having committed the crimes he was charged with having committed in aid thereof. This was error, as one's criminal intent is a necessary element of the proof required to convict under that statute. In *United States* v. *Byrd*, 352 F. 2d 570, 572 (2 Cir. 1965) such an omission in a charge was held by this court to be plain error requiring reversal of a conviction despite the absence of an objection at trial. It is also a necessary element of the proof needed to convict one who aids and abets a violation. See *United States* v. *Jones*, 308 F. 2d 26, 32 (2 Cir. 1962).

We do not consider the omission here, however, sufficiently prejudicial, in the absence of an objection at trial,

to require reversal of Umans' convictions on these counts. The agents whose criminal acts Umans was charged with aiding and abetting were prosecuted together with him in the same indictment with him, prior to Umans' trial had pleaded guilty to having committed the crimes, had testified for the Government at Umans' trial, and had admitted their guilt on the stand in the jury's presence. The jury knew the agents had the required criminal intent from the agent's own testimony.

Appellant next claims that, as he had been convicted for committing the same criminal acts under 18 U. S. C. § 201(b) on the one hand, and on the other, under § 201(f), and had also been convicted for the same criminal acts on the one hand under 26 U. S. C. § 7214(a)(2), and, on the other, under 18 U. S. C. § 201, he had been, in both instances, convicted of having committed mutually inconsistent crimes.

It appears that in both claimed inconsistent instances one of the two statutes requires proof of an extra element to convict, a specific intent to influence official action, while the other statute only requires proof that payment was made to an agent in a situation where no payment was necessary.[1] There are no contradictory elements of re-

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[1] Umans claims inconsistency between 26 U. S. C. § 7214(a)(2):

§ 7214. Offenses by officers and employees of the United States

(a) Unlawful acts of revenue officers or agents.—Any officer or employee of the United States acting in connection with any revenue law of the United States—

* * * * * *

(2) who knowingly demands other or greater sums than are authorized by law, or receives any fee, compensation, or reward, except as by law prescribed, for the performance of any duty;

* * * * * *

(Footnote continued on following page)

quired proof between the two statutes; only additional elements of proof.

Moreover, there is no merit to appellant's contention that counts under § 201(f) charge appellant with paying the agents "properly" to perform their duties; the section makes it criminal to pay an official a sum which he is not entitled to receive regardless of the intent of either payor or payee with respect to the payment. *United States* v. *Irwin*, 354 F. 2d 192, 198 (2 Cir. 1965), *cert. denied*, 383 U. S. 967 (1966). Therefore, the correct relationship between § 201(b) and § 201(f) is that § 201(f) is a lesser included offense of § 201(b). There is no reason to believe that Congress intended that there should be concurrent

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shall be dismissed from office or discharged from employment and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both. The court may in its discretion award out of the fine so imposed an amount, not in excess of one-half thereof, for the use of the informer, if any, who shall be ascertained by the judgment of the court. The court also shall render judgment against the said officer or employee for the amount of damages sustained in favor of the party injured, to be collected by execution.

which contains no element of intent on the part of a person bribing a public official and a provision which does require an intent to influence an official decision, 18 U. S. C. § 201 (as effective until January 20, 1963):

§ 201. Offer to officer or other person

Whoever promises, offers, or gives any money or thing of value, or makes or tenders any check, order, contract, undertaking, obligation, gratuity, or security for the payment of money or for the delivery or conveyance of anything of value, to any officer or employee or person acting for or on behalf of the United States, or any department or agency thereof, in any official function, under or by authority of any such department or agency or to any officer or person acting for or on behalf of either House of Congress, or of any committee of either

(Footnote continued on following page)

convictions and sentences under both sections, and we should not allow multiple convictions based on the same transactions even where the sentences are concurrent. The sentences on the lesser § 201(f) counts therefore are vacated. This will have no effect upon appellant's term of imprisonment because the vacated sentences are concurrent with those remaining in force.

Appellant also claims prejudicial error because the trial court rejected his requested charge to the jury that he must be acquitted if the jury found that he was coerced by the revenue agents into making the payments he paid them.

(Footnote continued from preceding page)

House, or both Houses thereof, with intent to influence his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, or with intent to influence him to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States, or to induce him to do or omit to do any act in violation of his lawful duty, shall be fined not more than three times the amount of such money or value of such thing or imprisoned not more than three years, or both.

He also claims inconsistency between 18 U. S. C. § 201(f) (which became effective January 21, 1963):

(f) Whoever, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly gives, offers or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official;

* * * * *

Shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

and which contains no element of intent to influence an official act and a provision which does require such intent, 18 U. S. C. § 201(b):

(b) Whoever, directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person

(Footnote continued on following page)

The trial court rejected this instruction because he found "not one scintilla of evidence in the case with regard to a shakedown." Our examination of the record confirms this conclusion, and we approve the forthright action of the court below in refusing to give the requested immaterial charge.

In three instances Umans did not pay the Internal Revenue agents until after they had completed their audits on the tax returns in issue, and, as to these payments, Umans claims there is no evidence in the record that the payments were made with intent to influence the agents, as required under 18 U. S. C. § 201 and § 201(b). This claim is without merit. Not only may Umans' similar acts involved in the other counts be considered with respect to his intent in making these three payments, *United States* v. *Baneth*, 155 F. 2d 978, 980 (2 Cir. 1946), but there is evidence in the record that indicates that in each of the

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who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent—

(1) to influence any official act; or

(2) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(3) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of his lawful duty,

* * * * * *

Shall be fined not more than $20,000 or three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

three instances an arrangement or understanding with the agent had been arrived at, with payment to follow audit.

Appellant requested the trial judge to inspect the grand jury minutes. The request was refused. Because none of the government witnesses at the trial were witnesses before the grand jury, appellant claims that the trial judge should have inspected the minutes of the grand jury proceedings in order to determine whether there was testimony to support the indictment and whether there were inconsistencies between the testimony before the grand jury and that at trial. Appellant claims that the judge's failure to comply with his request was an abuse of discretion. There is no merit to this claim. The Government reveals that the indictment was based upon testimony of an Internal Revenue agent who summarized for the grand jury the contents of various affidavits of the witnesses who later testified at appellant's trial. While the grand jury testimony was not made available to appellant, these affidavits were furnished to him, and, even if the grand jury minutes had been turned over, the material therein would have added nothing to appellant's arsenal of information. *Costello v. United States*, 350 U. S. 359 (1956), allows the Government to obtain indictments based on hearsay evidence.

While we are not condemning the procedure used here before the grand jury, we think it not amiss for us to state that excessive use of hearsay in the presentation of government cases to grand juries tends to destroy the historical function of grand juries in assessing the likelihood of prosecutorial success and tends to destroy the protection from unwarranted prosecutions that grand juries are supposed to afford to the innocent. Hearsay evidence should only be used when direct testimony is unavailable or when it is demonstrably inconvenient to

summon witnesses able to testify to facts from personal knowledge. Appellant's claim of inconsistencies between grand jury and trial testimony is based on *United States* v. *Borelli*, 336 F. 2d 376 (2 Cir. 1964), *cert. denied sub nom. Mogavero* v. *United States*, 379 U. S. 960 (1956), which holds that the defendant is entitled for impeachment purposes to know about inconsistencies between the grand jury and trial testimony of trial witnesses. However, this claim was not raised by appellant at trial, and, even if it were, the claim has no merit, for appellant had the affidavits upon which the grand jury testimony was based.

Appellant maintains that he was prejudiced because statements of government witnesses were not turned over to him pursuant to his request under the Jencks Act, 18 U. S. C. § 3500. These statements were sealed by the court. We have examined these sealed statements and find that they relate to payments received by the government witnesses from persons other than appellant, and the material not furnished to appellant in no way related to him. During the trial appellant cross-examined the government witnesses extensively as to their dealings with other persons. In each instance the witness admitted accepting money from other taxpayers' representatives. Since questions on cross-examination calling for details of other instances of bribery for which the witness had been indicted might properly have been excluded at trial, *United States* v. *Irwin*, 354 F. 2d 192, 198 (2 Cir. 1965), *cert. denied*, 383 U. S. 967 (1966), appellant was not prejudiced by the unavailability of the statements for impeachment purposes. None of the government witnesses were asked on direct examination about payments to them by persons other than appellant, and the withheld material did not directly relate to the subject matter of the witnesses' direct testimony. Under these circumstances, production was not required

by the Jencks Act and the court's order sealing the statements was proper.

Appellant raises the question of the propriety of his being charged with aiding and abetting a violation of 26 U. S. C. § 7214(a)(2) so as to preserve that question for the consideration of the United States Supreme Court in the event of an appeal. He does not urge it before this court, conceding that our opinion in *United States* v. *Kenner*, 354 F. 2d 780 (2 Cir. 1965), *cert. denied*, 383 U. S. 958 (1966), resolves the issue against him.

Appellant's final point that 18 U. S. C. § 201(f) is void for vagueness need not be considered by us for we have vacated his convictions under that section on other grounds.

The judgment below should be affirmed except for the judgment of conviction upon the three counts charging violation of 18 U. S. C. § 201(f), which is ordered vacated.